No. 84-1717

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL ROBERT QUINN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a defendant has a Fourth Amendment expectation of privacy that entitles him to challenge the search of a boat, which he had never personally used prior to the search and which had been out of his custody and control for two months at the time of the search, on the grounds that he was the owner of the boat and was a co-venturer in a criminal enterprise involving the use of the boat by others to smuggle marijuana in which he had a possessory interest.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 751 F.2d 980.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1984. A petition for rehearing was denied on February 1, 1985 (Pet. App. 6a). On March 26, 1985, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including May 2, 1985. The petition was filed on that date and was granted on October 15, 1985 (J.A. 52). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATEMENT

In a four-count indictment returned in August 1983 in the United States District Court for the Northern District of California, respondent was charged with importing 12,000 pounds of marijuana into the United States on June 23, 1979, in violation of 21 U.S.C. 952(a); possessing with intent to distribute 12,000 pounds of marijuana on that date, in violation of 21 U.S.C. 841(a)(1); conspiring to import marijuana, in violation of 21 U.S.C. 963; and conspiring to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846. Following the district court's denial of his suppression motion for lack of "standing," respondent entered a conditional plea of guilty on the importation conspiracy count pursuant to Fed. R. Crim. P. 11(a)(2); the plea was conditioned on the outcome of respondent's appeal of the "standing" ruling. See J.A. 21-24. Respondent was sentenced to three years' imprisonment, fined $15,000, and ordered to forfeit a ranch and boat that were involved in the drug smuggling enterprise (J.A. 44-51). The court of appeals reversed the district court's decision on the issue of "standing" and remanded for disposition of respondent's suppression motion on the merits.

1. The relevant facts are set forth in the government's brief and supporting affidavit in opposition to respondent's motion to suppress (J.A. 29-31, 39-41). Respondent did not contest the government's submission or present any additional evidence.

This uncontroverted record shows that in 1978 respondent solicited co-conspirator George Hunt to participate in a scheme to import marijuana by boat from Colombia to respondent's ranch on the coast of Northern California.[1]

[1] Following his eventual extradition from Colombia in August 1983, Hunt pleaded guilty pursuant to a plea agreement and testified before the grand jury that returned the instant indictment against respondent (J.A. 42).

The scheme contemplated that respondent would purchase a boat for transporting the marijuana and that Hunt would obtain a crew, pick up the marijuana in Colombia and deliver it to California, and then go to Mexico with the boat and crew. Pursuant to that plan, respondent purchased a fishing boat, the *Sea Otter*, in San Diego. J.A. 29, 39-40. Respondent has not contended that he personally used the *Sea Otter* at that time or maintained living quarters or storage space on it.

In the spring of 1979, respondent turned over the *Sea Otter* to three men who had been recruited by Hunt, and they sailed to Mexico to meet Hunt. In May 1979, the *Sea Otter* picked up 12 tons of marijuana in Colombia. It then traveled back to California, where the crew contacted respondent and delivered a six-ton shipment of marijuana to his ranch in June.[2] Respondent did not accompany the others on any part of this trip, and at no time during this approximately two-month period was he aboard the *Sea Otter*. J.A. 30, 40; Pet. App. 9a.

Thereafter, on the evening of June 27, 1979, California Fish and Game officials boarded the *Sea Otter* because they suspected that it had been engaged in unlawful fishing operations. However, an inspection could not be conducted due to darkness, and the officers returned the next morning. At that time they observed in plain view marijuana debris and items that had been purchased in Mexico. The state officers then left and notified the United States Coast Guard and the Customs Service of their suspicions that the *Sea Otter* had been involved in smuggling marijuana. J.A. 30, 40.

[2] Six tons of the original 12-ton cargo were destroyed by a fire on the *Sea Otter* during its voyage.

A short time later, federal officials intercepted the *Sea Otter* and went aboard. The crew was unable to produce the documentation for the boat, and one of the crew members was discovered to have an expired visa. Hunt then admitted that he had not contacted either the Coast Guard or the Immigration and Naturalization Service when the vessel arrived at the California coast. Moreover, the officials came across a receipt for repair work done in Mexico, and Hunt conceded that these repairs had not been reported to Customs. Finally, although the crew members denied that they had been ashore in California, the federal officers saw two large rafts on board that appeared to have been recently used. J.A. 30-31, 40.

The *Sea Otter* was placed under constructive seizure and taken to a Coast Guard station. There, water in its forward holds was pumped out, and marijuana residue was found. Hunt and the other crew members were arrested, but they were later released when no formal charges were brought. J.A. 31, 40-41.

Hunt remained in the San Francisco area for nine months while the *Sea Otter* underwent repairs. He then took the boat to Costa Rica and used it for commercial fishing. In November 1981, the *Sea Otter* was turned over to respondent in Costa Rica. J.A. 31, 41. Respondent has made no claim that he personally used or was even ever aboard the *Sea Otter* during the two and one-half years between the spring of 1979 and November 1981.

2. In the district court, respondent filed a motion to suppress evidence on the ground that the stop and the search of the *Sea Otter* were unlawful. Respondent based his right to seek suppression on the fact that he was the owner of the *Sea Otter* (J.A. 26, 32; Pet. App. 8a). The district court denied the motion, finding that respondent had no expectation of privacy and thus lacked "standing" under the Fourth Amendment because he was not present at the time of the search and had turned over the vessel to the control and operation of others (*id.* at 9a).

3. On respondent's appeal pursuant to his conditional guilty plea, a divided panel of the court of appeals reversed (Pet. App. 1a-4a). The majority concluded that respondent had a legitimate expectation of privacy in the *Sea Otter*, which entitled him to challenge the validity of the search, "based on the conjunction" (*id.* at 2a) of the following factors: (1) "[h]is ownership of the boat" (*ibid.*); (2) "[h]is possessory interest in the marijuana seized, arising from his joint venture with Hunt for the smuggling of marijuana" (*ibid.*); (3) "[t]he fact that the boat, when searched, was returning from a delivery of marijuana to [respondent] and was, thus, pursuing the purpose of [his] joint venture" (*ibid.*); and (4) "[t]he fact that to find the marijuana it was necessary to pump out the forward hold of the boat, indicating that reasonable precautions had been taken to preserve privacy" (*id.* at 3a). Accordingly, the court of appeals remanded the case to the district court for consideration of the merits of respondent's motion to suppress (*ibid.*).

Judge Sneed dissented (Pet. App. 4a). He stated that a defendant's expectation of privacy would be reasonable and legitimate under the Fourth Amendment only if it "corresponds to that which would have been entertained by a reasonable, but innocent and law abiding, person having the same relationship as did the [defendant] to the area and objects searched" (*ibid.*). Applying that standard, Judge Sneed concluded that respondent had no Fourth Amendment privacy interest in the *Sea Otter* because "[m]ere ownership of the boat and a joint venture to transport non-contraband (lumber, for example) would not lead a reasonable co-owner, who was neither a member of the crew nor a passenger, to expect that any papers or valuables he placed in the hold of the boat would remain private" (*ibid.*).

SUMMARY OF ARGUMENT

In this case, the Ninth Circuit has held that under the Fourth Amendment a defendant has a legitimate expectation of privacy in a boat simply on the basis that he is the owner of record of the vessel and is a co-venturer in a criminal enterprise involving the use of the ship by others to smuggle drugs in which he has a possessory interest. Respondent was accordingly permitted to challenge the lawfulness of the stop, boarding, and search of the boat, and thus to seek the suppression of evidence seized during the search, even though it is undisputed that he never personally used the boat, that he purchased it for others to use in a drug smuggling scheme, that he had relinquished custody and control over the boat for a two-month period at the time of the search, and that he was not present on the boat during either the smuggling expedition or the search.

In effect, the court of appeals' decision creates a rule of "automatic standing" that allows a defendant who is the absentee owner of a conveyance to seek the suppression of evidence found thereon if, at the time of the stop or search, it was being used by his confederates in furtherance of their joint criminal venture. Whether viewed individually or together, the considerations relied on by the court below do not establish that *the defendant* had a Fourth Amendment expectation of privacy in the area searched or that the government's action implicated *his* personal right to be free from unreasonable searches and seizures.

A defendant's ownership of the situs that was searched does not, as such, entitle him to challenge the validity of the search. The Fourth Amendment guarantee against unreasonable searches protects privacy interests, not property rights, and the fact of ownership of the searched area does not suffice to create a legitimate expectation of privacy. While the owner may have a privacy interest because of his control over the property and the uses he

makes of it, it is those factors, rather than his bare title, that establishes Fourth Amendment "standing." Here, the record is clear that respondent, notwithstanding his title interest, made no use of the searched boat that would in fact give rise to a legitimate expectation of privacy.

In addition, a legitimate expectation of privacy does not arise from a defendant's status as a criminal co-venturer with a possessory interest in the seized drugs. That a defendant engages in collective criminal activity neither entitles him to assert vicariously the Fourth Amendment rights of his confederates nor creates a personal privacy right on his part that would not otherwise exist. A principal-agent relation, although relevant to substantive criminal liability, does not confer a privacy interest on the principal.

Likewise, a possessory interest in the objects seized does not establish a privacy interest in the area searched. The Ninth Circuit's contrary conclusion confuses the distinct concepts of a defendant's possessory interest that is infringed by a seizure and his privacy interest that is infringed by a search. As the Court held in *United States* v. *Salvucci*, 448 U.S. 83 (1980), and *Rawlings* v. *Kentucky*, 448 U.S. 98 (1980), possession of the seized items is not equivalent to a legitimate expectation of privacy in the searched area, and the fact of possession cannot serve as a surrogate for the requisite privacy claim. And at all events a defendant can have no legitimate possessory interest in contraband that, by definition, he has no legal right to possess.

Accordingly, since respondent never personally used the *Sea Otter* and had yielded custody and control of it to others for a substantial period of time when the boat was searched, he is not entitled to challenge the propriety of the search. The facts that he was the technical title holder of the *Sea Otter* and was involved in a joint criminal venture in which others used the ship to smuggle his drugs do not indicate that he had a legitimate expectation of privacy under the Fourth Amendment.

ARGUMENT

RESPONDENT DID NOT HAVE A LEGITIMATE EXPECTATION OF PRIVACY IN THE *SEA OTTER* AND THEREFORE CANNOT SEEK TO SUPPRESS EVIDENCE OBTAINED DURING A SEARCH OF THE VESSEL

The undisputed record in this case establishes that respondent never personally used the *Sea Otter* or maintained private quarters on it, that he purchased the boat for the purpose of having other people use it in connection with a drug smuggling venture, that he was not present on the *Sea Otter* during its South American voyage or at the time it was searched, and that the boat was out of his custody and control during both the two-month period preceding that search and the two years following the search. Nevertheless, the Ninth Circuit held that respondent had a legitimate expectation of privacy in the *Sea Otter*, and therefore could seek the suppression of evidence, because he was the owner of the boat and because he was a co-venturer in the drug operation with a possessory interest in the marijuana that was seized. On that basis, the court of appeals reversed the district court's determination that respondent did not have "standing" under the Fourth Amendment to challenge the search.

The Ninth Circuit's legal analysis is irreconcilable with settled Fourth Amendment principles. Respondent had no legitimate expectation of privacy in the *Sea Otter*, since he had never used it and had relinquished custody and control over it for a considerable period of time when the search occurred. By basing an asserted privacy interest on respondent's title to the vessel and his role in the drug enterprise, the court of appeals has invented a legal principle that automatically confers Fourth Amendment "standing" on the absentee owner of a conveyance to challenge any search of that conveyance that takes place during the course of a joint criminal venture.

Such a holding is fundamentally misconceived and would unjustifiably impede the prosecution and conviction of those guilty of crimes. It is frequently the situation that a defendant—and, as in this case, often the leader or "kingpin" of the illegal scheme—will purchase a conveyance for his confederates to use in a joint criminal enterprise. To permit that defendant to move to suppress evidence based on a challenge to the search, even though no privacy interest of his was implicated, is an unsupported and unsound rule that serves only to confer a Fourth Amendment windfall on defendants like respondent.

Preliminarily, we note that respondent's motion for suppression of evidence asserted a challenge to the initial stop and boarding of the *Sea Otter* as well as to the subsequent search of the ship. The stop, however, while temporarily interfering with the liberty of movement of persons aboard the vessel and therefore a seizure within the meaning of the Fourth Amendment (see *Terry* v. *Ohio*, 392 U.S. 1, 16, 19 n.16 (1968)), plainly invaded no right of respondent's, who was many miles away and whose freedom of movement was wholly unrestricted. It is virtually a truism to say that those who have not been seized may not contest the lawfulness of the seizure. See, *e.g. Alderman* v. *United States*, 394 U.S. 165, 172-173 (1969); *Wong Sun* v. *United States*, 371 U.S. 471, 491-492 (1963); see also 3 W. LaFave, *Search and Seizure* § 11.3, at 545, 571 (1978). Similarly, much like the "open fields" around a dwelling (see *Oliver* v. *United States*, No. 82-15 (Apr. 17, 1984)), the deck or other exposed area of the *Sea Otter* is not a place in which respondent as the owner could have a reasonable expectation of privacy, and therefore he cannot object to the boarding as a ground for suppressing evidence. Accordingly, even if respondent were found to have a privacy interest in the *Sea Otter* that entitles him to raise the question whether the search of the boat was itself

a violation of the Fourth Amendment, he cannot even colorably claim the right to attack the lawfulness of the initial stop and boarding of the vessel.

A. A Defendant Can Seek The Suppression Of Evidence Based On An Allegedly Invalid Search Only If He Establishes That The Challenged Search Implicated His Own Privacy Interest

The Fourth Amendment " 'protects people from unreasonable government intrusions into their legitimate expectations of privacy.' " *United States* v. *Place*, 462 U.S. 696, 706-707 (1983), quoting *United States* v. *Chadwick*, 433 U.S. 1, 7 (1977). As the Court explained in *United States* v. *Knotts*, 460 U.S. 276, 280-281 (1983), quoting *Smith* v. *Maryland*, 442 U.S. 735, 740-741 (1979), and *Katz* v. *United States*, 389 U.S. 347 (1967):

> "Consistently with *Katz*, this Court uniformly has held that application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action. [Citations omitted.] This inquiry, as Mr. Justice Harlan aptly noted in his *Katz* concurrence, normally embraces two discrete questions. The first is whether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy,' 389 U.S., at 361 – whether, in the words of the *Katz* majority, the individual has shown that 'he seeks to preserve [something] as private.' *Id.*, at 351. The second question is whether the individual's subjective expectation of privacy is 'one that society is prepared to recognize as "reasonable," ' *id.*, at 361 – whether, in the words of the *Katz* majority, the individual's expectation, viewed objectively, is 'justifiable' under the circumstances. *Id.*, at 353."

See also, *e.g.*, *Hudson* v. *Palmer*, No. 82-1630 (July 3, 1984), slip op. 7. Proper application of the Fourth Amendment requires a court to reconcile the "conflict • • • between the individual's constitutionally protected interest in privacy and the public interest in effective law enforcement." *United States* v. *Ross*, 456 U.S. 798, 804 (1982). Under this constitutional standard, courts cannot " 'merely recite the [defendant's] expectations and risks without examining the desirability of saddling them upon society.' " *Hudson* v. *Palmer*, slip op. 7 n.7, quoting *United States* v. *White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting).

In order to contest the legality of a search as a basis for seeking the suppression of evidence, a defendant must show that the search implicated a privacy interest of his that the Fourth Amendment protects. See *Rakas* v. *Illinois*, 439 U.S. 128, 140 (1978). Under settled principles, "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." *Alderman* v. *United States*, 394 U.S. 165, 174 (1969). Thus, it is "the established rule that a court may not exclude evidence under the Fourth Amendment unless it finds that an unlawful search or seizure violated the defendant's own constitutional rights. And the defendant's Fourth Amendment rights are violated only when the challenged conduct invaded *his* legitimate expectation of privacy rather than that of a third party." *United States* v. *Payner*, 447 U.S. 727, 731 (1980) (emphasis in original; citation omitted). For this reason, "suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." *Alderman*, 394 U.S. at 171-172. See also, *e.g.*, *United States* v. *Salvucci*, 448 U.S. 83, 86-87, 94 (1980); *Rakas*, 439 U.S. at 133-134 & n.3, 137, 138.

In addition, the defendant, as "[t]he proponent of a motion to suppress [,] has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search * * * ." *Rakas*, 439 U.S. at 131 n.1. Accordingly, to prevail, the defendant must show "not only that the search * * * was illegal, but also that he had a legitimate expectation of privacy in [the area or item that was searched]." *Rawlings* v. *Kentucky*, 448 U.S. 98, 104 (1980). And if the defendant's allegations regarding the requisite privacy interest are contested, the defendant is "put to [his] proof on * * * [the] issue" (*Rakas*, 439 U.S. at 131 n.1) and must " 'establish * * * that he himself was the victim of an invasion of privacy.' " *Alderman*, 394 U.S. at 173, quoting *Jones* v. *United States*, 362 U.S. 257, 261 (1960); see also *e.g.*, *United States* v. *Bachner*, 706 F. 2d 1121, 1125-1128 (11th Cir.), cert. denied, 464 U.S. 896 (1983).[3]

[3] Where the defendant does not raise grounds that adequately demonstrate a legitimate privacy interest, his motion to suppress should be denied. See *Rakas*, 439 U.S. at 131 n.1. Furthermore, denial of the suppression motion is appropriate in that circumstance even if the government's proof at trial will establish sufficient facts to demonstrate his "standing." See *United States* v. *Gomez*, 770 F.2d 251, 252-254 (1st Cir. 1985). While the government may not, of course, contest the defendant's assertion of "standing" at the suppression hearing on the basis of facts that it knows are inconsistent with its submission at trial, the defendant's failure to go forward with his burden of proof requires that his motion be denied; unless and until the defendant makes a prima facie showing, the government need not put on evidence to oppose suppression, and the defendant's motion must be rejected. Indeed, especially since a defendant will invariably know any circumstances that establish his privacy interest in the searched premises, his failure to present them is little different from the failure to file a suppression motion at all. Notwithstanding these principles, some courts have incorrectly looked to the government's case at trial to determine whether the defendant carried his burden on the "standing" issue at the suppression hearing. See *United States* v. *Bagley*, 765 F.2d 836, 843 (9th Cir. 1985); *United States* v. *Morales*, 737 F.2d 761, 762-764 (8th Cir. 1984).

B. Respondent's Title To The *Sea Otter* And His Role In The Drug Smuggling Enterprise Do Not Give Rise To A Privacy Interest Under The Fourth Amendment

In holding that respondent had a legitimate expectation of privacy in the *Sea Otter*, the Ninth Circuit departed from the clear teachings of this Court's decisions. The factors cited by the court—respondent's ownership of the *Sea Otter* and his status as a criminal co-venturer with a stake in the seized marijuana—do not give rise to the requisite privacy interest to entitle respondent to challenge the search of the boat. On the contrary, by allowing a defendant to seek the suppression of evidence even though he had made no personal use of the searched conveyance and had relinquished custody and control of it for an extended period, the court of appeals has manifestly and unreasonably expanded Fourth Amendment rights beyond the bounds fixed by this Court.

1. *Respondent's Title To the Sea Otter*

In concluding that respondent had an expectation of privacy in the *Sea Otter*, the court of appeals first relied on "[h]is ownership of the boat" (Pet. App. 2a). But this Court has made clear that title to the object or area searched does not suffice to create a privacy interest under the Fourth Amendment. See, *e.g.*, *Oliver* v. *United States*, No. 82-15 (Apr. 17, 1984), slip op. 11-12; *Illinois* v. *Andreas*, 463 U.S. 765, 771 (1983); *Knotts*, 460 U.S. at 285; *Rakas*, 439 U.S. at 143-144 & n.12; *Mancusi* v. *DeForte*, 392 U.S. 364, 368 (1968); *Katz*, 389 U.S. at 352-353. The "capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas*, 439 U.S. at 143; see also *Mancusi* v. *DeForte*, 392 U.S. at 368. Because "[t]he Fourth Amendment protects legitimate expectations of privacy rather than simply places," an

"owner may retain the incidents of title • • • but not privacy." *Andreas*, 463 U.S. at 771. Thus, " 'even a property interest in [the] premises [searched] may not be sufficient to establish a legitimate expectation of privacy • • • .' " *Oliver*, slip op. 11, quoting *Rakas*, 439 U.S. at 144 n.12.[4]

The courts of appeals likewise have recognized that ownership or other proprietary right in the property searched does not itself give rise to a Fourth Amendment privacy interest.[5] As the court explained in *United States* v. *Dyar*, 574 F.2d 1385, 1390 (5th Cir.), cert. denied, 439 U.S. 982 (1978):

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[4] The Court has followed a similar analysis in the comparable area of third-party consent searches. See *United States* v. *Matlock*, 415 U.S. 164, 171 n.7 (1974) (citations omitted):

> Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

[5] See, *e.g.*, *United States* v. *Gomez*, 770 F.2d 251, 254-255 (1st Cir. 1985); *United States* v. *Willis*, 759 F.2d 1486, 1494, 1498-1499 (11th Cir. 1985); *United States* v. *DeWeese*, 632 F.2d 1267, 1270 (5th Cir. 1980), cert. denied, 454 U.S. 878 (1981); *United States* v. *Ramapuram*, 632 F.2d 1149, 1154 (4th Cir. 1980), cert. denied, 450 U.S. 1030 (1981); *United States* v. *Rios*, 611 F.2d 1335, 1345 (10th Cir. 1979); *United States* v. *Dall*, 608 F.2d 910, 914-915 (1st Cir. 1979), cert. denied, 445 U.S. 918 (1980); *United States* v. *Dyar*, 574 F.2d 1385 (5th Cir.), cert. denied, 439 U.S. 982 (1978); *United States* v. *Kelly*, 529 F.2d 1365, 1369 (8th Cir. 1976); *United States* v. *Nunn*, 525 F.2d 958, 959 (5th Cir. 1976); *United States* v. *Hunt*, 505 F.2d 931, 940-941 (5th Cir. 1974), cert. denied, 421 U.S. 975 (1975); see also 3 W. LaFave, *Search and Seizure* § 11.3, at 575 (1978); *id.* at 214 n.15, 238 n.145.1 (Supp. 1984). Indeed, the Ninth Circuit itself has previously recognized this principle. See *United States* v. *One 1977 Mercedez Benz*, 708 F.2d 444, 448-450 (9th Cir. 1983).

> Traditional or common law theories of property rights do not automatically confer standing to challenge a search. Property rights in [the] absence of reasonable expectations of privacy in property cannot support a Fourth Amendment claim • • • . Ownership • • • must be accompanied by a cognizable privacy interest in the place or thing searched.

Thus, "[o]wnership alone is not enough to establish a reasonable and legitimate expectation of privacy"; rather, "the total circumstances determine whether the one challenging the search has a reasonable and legitimate expectation of privacy in the locus of the search." *United States* v. *Dall*, 608 F.2d 910, 914 (1st Cir. 1979), cert. denied, 445 U.S. 918 (1980). It is insufficient for a defendant to "offer[] nothing more • • • than • • • bare legal ownership of [the place searched]. While this may adequately establish a property right, he has not sustained his burden of showing that his Fourth Amendment privacy interest has been invaded • • • [because] he 'took normal precautions to maintain his privacy' • • • [or] used the [place] in such a way as to raise a legitimate expectation of privacy." *United States* v. *Rios*, 611 F.2d 1335, 1345 (10th Cir. 1979) (citation and footnotes omitted).

To be sure, "by focusing on legitimate expectations of privacy in Fourth Amendment jurisprudence, the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment." *Rakas*, 439 U.S. at 144 n.12. Ordinarily, an owner "lawfully possesses or controls [his] property" and has "the right to exclude others" (*ibid.*). For this reason, ownership will often be associated with some use or occupancy of the property, including the restriction of other people from it, that gives rise to an expectation of privacy on the part of the owner. See *Oliver*, slip op. 6; *Rakas*, 439 U.S. at 144 n.12; *id.* at 153 (Powell, J., concurring). Accordingly, ownership may be relevant as "one element" in analyzing the existence of a legitimate

privacy interest. *Oliver*, slip op. 11. But in the end it is the expectation of privacy deriving from the way in which the property is used, not the fact of ownership as such, that is the controlling Fourth Amendment standard.

In this case, it is evident that respondent had no privacy interest in the *Sea Otter*. Although he was technically the owner, respondent had never used the boat, had not lived aboard it or kept private quarters on it, and did not utilize it as a repository for personal effects. To the contrary, respondent had purchased the vessel for the specific purpose of having *others* operate it to smuggle drugs. Moreover, the *Sea Otter* was entirely out of respondent's custody and control for a significant period—two months—before the search in question took place in June 1979, and it remained out of his possession for more than two years thereafter while Hunt had it repaired and then used it for commercial fishing in Costa Rica. Nor during that time did respondent undertake in any way to maintain the privacy interest that he now asserts. In these circumstances, respondent's bare title does not establish an expectation of privacy in the *Sea Otter*.[6]

2. *Respondent's Co-Venturer Status And Possessory Interest In the Seized Marijuana*

The court of appeals also premised respondent's privacy interest on the facts that (a) he was engaged in a "joint venture with Hunt for the smuggling of marijuana" and the *Sea Otter*, "when searched, was • • • pursuing the purpose of [respondent's] joint venture" (Pet. App. 2a), and (b) he had a "possessory interest in the marijuana seized, arising from his joint venture" (*ibid.*). See also *United States* v. *Johns*, 707 F.2d 1093, 1099-1100 (9th Cir. 1983),

[6] Indeed, even if respondent had used the *Sea Otter* in such a way that he had a legitimate privacy interest in it at one time, any such interest would have lapsed by virtue of his prolonged relinquishment of the boat to Hunt.

rev'd on other grounds, No. 83-1625 (Jan. 21, 1985); *United States* v. *Mazzelli*, 595 F.2d 1157 (9th Cir. 1979), vacated and remanded *sub nom. United States* v. *Conway*, 448 U.S. 902 (1980). However, under settled Fourth Amendment principles, neither of these aspects of respondent's role in the drug smuggling enterprise created a legitimate expectation of privacy.[7]

a. As discussed above (see pages 10-11, *supra*), the interest in privacy protected by the Fourth Amendment is a personal right, and a defendant may not vicariously assert the rights of third parties as a ground for seeking the

[7] The court of appeals also reasoned that "[w]here a joint venture is being pursued, the mere fact of a joint venturer's absence from the place searched is insufficient to establish abandonment or relinquishment of the property seized" (Pet. App. 2a-3a). This seems true enough as regards property interests; moreover, in the abstract, the court's observation may well be correct even in the case of privacy interests. A person who has an expectation of privacy in certain property, and temporarily entrusts that property to a relative, friend or associate to further a common objective, does not necessarily lose his privacy interest; the continuation of that expectation of privacy would depend on such considerations as the nature and extent of the preexisting privacy interest, the type of property involved, the relationship between the parties, and the terms and duration of the bailment. See generally *United States* v. *One 1977 Mercedez Benz, supra; United States* v. *Rios, supra; United States* v. *Dall, supra; United States* v. *Dyar, supra;* 3 W. LaFave, *Search and Seizure* § 11.3, at 575 (1978); *id.* at 214 n.15, 238 n.145.1 (Supp. 1984). In this case, however, as noted above (see page 16 note 6, *supra*), we believe that any expectation of privacy respondent might otherwise have had was lost when he gave up custody and control over the *Sea Otter* to Hunt for an extended period and made no effort to preserve the privacy interest that he now advances. But more to the point here, the question presented on these facts is not, contrary to the court of appeals' characterization, whether respondent abandoned or relinquished a privacy interest that he had; rather, the issue is whether he had an expectation of privacy in the first place. As we discuss in the text, respondent's status as a co-venturer with a possessory interest in the seized marijuana does not support his privacy claim.

suppression of evidence against him. In particular, confederates in a criminal enterprise—whether called co-conspirators, co-defendants, or co-venturers—"have been accorded no special standing" to raise the Fourth Amendment rights of each other. *Alderman*, 394 U.S. at 172; see also, *e.g.*, *United States* v. *Leon*, No. 82-1771 (July 5, 1984), slip op. 10-11; *Stanley* v. *United States*, 447 U.S. 10, 23-24 (1980); *Brown* v. *United States*, 411 U.S. 223, 230 & n.4 (1973). Respondent's position as a co-venturer does not expand the claims he may advance in support of his motion to suppress or entitle him to raise the Fourth Amendment rights of others. Likewise, in analyzing the issue of respondent's own Fourth Amendment rights, his co-venturer status gives rise to no protected expectation of privacy on his part. The fact that respondent acted in league with others in the marijuana smuggling scheme simply does not bear on the question whether he himself had a privacy interest in the *Sea Otter* in the first instance.

In contrast to the decision below, other courts of appeals have recognized that a defendant's participation in a joint criminal venture does not establish a personal expectation of privacy under the Fourth Amendment.[8] As the court explained in *United States* v. *Hunt*, 505 F.2d 931,

[8] See, *e.g.*, *United States* v. *Manbeck*, 744 F.2d 360, 373-374 (4th Cir. 1984), cert. denied, No. 84-1194 (Feb. 19, 1985); *United States* v. *Brown*, 743 F.2d 1505, 1506-1507 (11th Cir. 1984); *United States* v. *Little*, 735 F.2d 1049, 1053, rev'd on other grounds, 743 F.2d 1261 (8th Cir. 1984), cert. denied, Nos. 84-1122 and 84-1126 (Feb. 19, 1985); *United States* v. *Knotts*, 662 F.2d 515, 518 (8th Cir. 1981), rev'd on other grounds, 460 U.S. 276 (1983); *United States* v. *DeLeon*, 641 F.2d 330, 337 (5th Cir. 1981); *United States* v. *Davis*, 617 F.2d 677, 690 (D.C. Cir. 1979), cert. denied, 445 U.S. 967 (1980); *United States* v. *Vicknair*, 610 F.2d 372, 379 (5th Cir. 1980); *United States* v. *Archbold-Newball*, 554 F.2d 665, 678 (5th Cir.), cert. denied, 434 U.S. 1000 (1977); *United States* v. *Galante*, 547 F.2d 733, 739 (2d Cir. 1976), cert. denied, 431 U.S. 969 (1977); *United States* v. *Hunt*, 505 F.2d at 940, 941-942.

942 (5th Cir. 1974), cert. denied, 421 U.S. 975 (1975):

> [A] principal-agent relationship sufficient to imply culpability may certainly fall short of conferring standing for Fourth Amendment purposes. Defendant's contention flies directly in the face of *Alderman*. • • • .
>
> • • • Fifteen years of Supreme Court decisions stand squarely in the way of defendants' attempt to create a rule of *per se* standing for parties in a principal-agent relationship. This claim of privacy by agency is just the sort of vicarious assertion of Fourth Amendment rights that *Alderman* and *Brown* forbid.

Thus, "[n]either [a defendant's] mere presence in the conspiracy nor the acts of his co-conspirators can give him a legitimate expectation of privacy in the [searched area] where none otherwise exists." *United States* v. *Little*, 735 F.2d 1049, 1053, rev'd on other grounds, 743 F.2d 1261 (8th Cir. 1984), cert. denied, Nos. 84-1122 and 84-1126 (Feb. 19, 1985).

b. Nor does a legitimate expectation of privacy arise merely because respondent, in connection with his role in the drug smuggling scheme, asserted a possessory interest in the marijuana that was seized during the search of the *Sea Otter*.[9] Although at one time it was assumed that "a defendant's possession of a seized good sufficient to establish criminal culpability was also sufficient to establish Fourth Amendment 'standing,' " that "assumption • • • is no longer so." *Salvucci*, 448 U.S. at 90 (footnote omitted).

[9] In fact, the *Sea Otter* was stopped and searched after its cargo of marijuana had been delivered to respondent's ranch, and only marijuana residue was found on the boat. The seizure of that residue did not interfere with respondent's possessory interest. First, because those trace amounts were left aboard the *Sea Otter* after the shipment of marijuana had been unloaded, any interest therein had been abandoned. Second, the Fourth Amendment does not protect a property interest in such de minimis quantities. See *United States* v. *Jacobsen*, No. 82-1167 (Apr. 2, 1984), slip op. 15.

The recent decisions of this Court make clear the distinction between a privacy interest in the area or item searched and a possessory interest in the object seized: a search involves a governmental intrusion upon a person's legitimate expectation of privacy in the locus of the inspection or examination, while a seizure entails an interference with a person's possessory interest in the res that was impounded.[10] To conclude that a possessory interest in the seized object establishes a privacy interest in the searched area, as the court below did, confuses these analytically distinct concepts.[11] Indeed, this Court has specifically "decline[d] to use possession of a seized good as a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched." *Salvucci*, 448 U.S. at 92. Because of the difference between privacy and possessory interests, "legal possession of a seized good is not a proxy for determining whether the owner had a Fourth Amendment interest, for it does not invariably represent the protected Fourth

[10] See, *e.g.*, *Maryland* v. *Macon*, No. 84-778 (June 17, 1985), slip op. 5-6; *United States* v. *Karo*, No. 83-850 (July 3, 1984), slip op. 6; *United States* v. *Jacobsen*, No. 82-1167 (Apr. 2, 1984), slip op. 3; *Salvucci*, 448 U.S. at 91 n.6; see also *United States* v. *Lisk*, 522 F.2d 228, 230-231 (7th Cir. 1975) (Stevens, J.), cert. denied, 423 U.S. 1078 (1976), subsequent opinion, 559 F.2d 1108 (7th Cir. 1977).

[11] An ownership interest in the seized property may be sufficient in some cases to entitle the owner to challenge the validity of the seizure (as opposed to the search) as a basis for seeking the suppression of that evidence against him. See *Salvucci*, 448 U.S. at 91 n.6. Moreover, the owner may be able to do so even if the property is temporarily out of his possession. See *United States* v. *House*, 524 F.2d 1035, 1042 (3d Cir. 1975). Here, however, in light of his extended relinquishment of the *Sea Otter* to Hunt, respondent had no cognizable interest that was infringed by the seizure of the boat and thus cannot move to suppress the evidence resulting therefrom. See *Place*, 462 U.S. at 705-706 & n.6; *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970). In addition, an owner would have "standing" to seek the return of his property insofar as its continued detention (as opposed to the original seizure) interfered with his interest as the title owner; in this case, though, the *Sea Otter* was not detained for a protracted period and in any event was subject to forfeiture because of its use in smuggling marijuana.

Amendment interest" (*id.* at 91). Thus, "[t]he person in legal possession of a good seized during an illegal search has not necessarily been subject to a Fourth Amendment deprivation" (*ibid.*). See also *Rawlings* v. *Kentucky*, 448 U.S. 98, 105-106 (1980).[12]

Of course, the fact that one's personal effects are kept in a place may be relevant to the question whether the person has a reasonable expectation of privacy in that place. See *Rawlings*, 448 U.S. at 105; *Salvucci*, 448 U.S. at 91; *Rakas*, 439 U.S. at 142 n.11, 144 n.12. But this simply reflects the more general proposition that the use to which the searched property was put--including its use as a repository for one's possessions--is one indication of a privacy interest. See *Oliver*, slip op. 6; *Rakas*, 439 U.S. at 144 n.12; *id.* at 153 (Powell, J., concurring).[13] The dispositive issue remains, however, "not merely whether the defendant had a possessory interest in the items seized, but whether he had an expectation of privacy in the area searched" (*Salvucci*, 448 U.S. at 93), and "property rights are neither the beginning nor the end of this • • • inquiry" (*id.* at 91).[14]

[12] The "unexamined assumption" (*Salvucci*, 448 U.S. at 90) that a possessory interest sufficient to prove criminal liability also sufficed to confer a Fourth Amendment privacy interest was one of the premises of the "automatic standing" rule of *Jones* v. *United States*, 362 U.S. 257 (1960). In overturning that rule in *Salvucci*, the Court expressly rejected the contention "that possession of a seized good is the equivalent of Fourth Amendment 'standing' " (488 U.S. at 93). Similarly, in *Rawlings* v. *Kentucky*, *supra*, decided the same day as *Salvucci*, the Court squarely held that a possessory interest in the items seized during a search does not establish a privacy interest in the area searched (see 448 U.S. at 105-106).

[13] In this case, it is clear--and neither the court of appeals nor respondent has asserted otherwise--that respondent never used the *Sea Otter* in any way that would in fact give rise to a reasonable expectation of privacy. Rather, the court relied simply on respondent's "possessory interest in the marijuana seized" (Pet. App. 2a).

[14] In *Rakas*, the Court, after explaining that ca[illegible]itors do not have a privacy interest in searched premises, wen[illegible] note that "[t]his is not to say that such visitors could not conte[illegible] lawfulness

Futhermore, even if a possessory interest in the items seized could entitle a defendant to contest the underlying search, an asserted interest in contraband would not support a Fourth Amendment claim. The theory for allowing a possessory interest in the seized objects to authorize a challenge to the search (which, we reiterate, the Court in fact rejected in *Salvucci* and *Rawlings*) is that "[w]hen the government seizes a person's property, it interferes with his constitutionally protected right to be secure in his effects. • • • If the defendant's property was seized as the result of an unreasonable search, the seizure cannot be other than unreasonable." *Rawlings*, 448 U.S. at 118 (Marshall, J., dissenting); see also *id.* at 114 (Marshall, J., dissenting). However, a person can have no lawful possessory interest in contraband that, by definition, he may not legally posses. "Congress has decided—and there is no question about its power to do so—to treat the interest in 'privately' possessing [contraband drugs] as illegitimate • • • ." *United States* v. *Jacobsen*, No. 82-1167 (Apr. 2, 1984), slip op. 13; see also *Illinois* v. *Andreas*, 463 U.S. at 771; *United States* v. *Place*, 462 U.S. at 707; *Brown* v. *United States*, 411 U.S. 223, 230 n.4 (1973); cf. *Rakas*, 439 U.S. at 141 n.9 (no privacy interest in stolen car that was searched); *Jones*, 362 U.S. at 267 (person

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of the seizure of evidence *or the search if their own property were seized during the search*" (439 U.S. at 142 n.11 (emphasis added)). This passing statement does not imply that a possessory interest in the items seized is sufficient, without more, to establish a privacy interest in the area searched that would enable the defendant to challenge the search. Rather, it simply reflects the general proposition, discussed above and recognized in *Rakas* itself (439 U.S. at 143-144 & n.12; *id.* at 153 (Powell, J., concurring)), that a person's use of an area as a repository for his personal effects can be indicative of his expectation of privacy in that area. So viewed, it is consistent with the Court's subsequent decisions in *Salvucci* and *Rawlings*; conversely, a contrary reading would not survive those later decisions. See *Rawlings*, 448 U.S. at 115 (Marshall, J., dissenting). Especially since the defendants in *Rakas* had no possessory interest in the seized evidence (see 439 U.S. at 129, 130-131 & n.1, 148), the brief dictum in the *Rakas* footnote—which was not cited by the Court of Appeals in this case—cannot justify the analysis below.

wrongfully present in searched premises cannot claim privacy interest). Because the Fourth Amendment protects only "legitimate" expectations of privacy that "society is prepared to recognize as reasonable" (see *New Jersey* v. *T.L.O.*, No. 83-712 (Jan. 15, 1985), slip op. 11; *Hudson* v. *Palmer*, No. 82-1630 (July 3, 1984), slip op. 7), a claimed interest in contraband provides no basis for a defendant to seek to suppress evidence. In accord with these principles, the courts of appeals have recognized that possession of contraband does not give rise to a legitimate Fourth Amendment interest.[13]

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[13] See, *e.g.*, *United States* v. *Manbeck*, 744 F.2d at 374 n.16; *United States* v. *Karo*, 710 F.2d 1433, 1436 (10th Cir. 1983), rev'd on other grounds, No. 83-850 (July 3, 1984); *United States* v. *Bentley*, 706 F.2d 1498, 1505 n.5 (8th Cir. 1983), cert. denied, 464 U.S. 830 (1983) and No. 83-5027 (May 21, 1984); *United States* v. *Parks*, 684 F.2d 1078, 1083 n.7 (5th Cir. 1982); *United States* v. *Bruneau*, 594 F.2d 1190, 1194 n.6 (8th Cir.), cert. denied, 444 U.S. 847 (1979); *United States* v. *Washington*, 586 F.2d 1147, 1154 (7th Cir. 1978); *United States* v. *Pringle*, 576 F.2d 1114, 1119 (5th Cir. 1978); *United States* v. *Moore*, 562 F.2d 106, 111 (1st Cir. 1977), cert. denied, 435 U.S. 926 (1978); *United States* v. *Galante*, 547 F.2d 733, 739-740 (2d Cir. 1976), cert. denied, 431 U.S. 969 (1977); *United States* v. *Emery*, 541 F.2d 887, 890 (1st Cir. 1976); *United States* v. *Sacco*, 436 F.2d 780, 784 (2d Cir.), cert. denied, 404 U.S. 834 (1971); *United States* v. *Bozza*, 365 F.2d 206, 223 (2d Cir. 1966); cf. *United States* v. *McCambridge*, 551 F.2d 865, 870 n.2 (1st Cir. 1977) (no privacy interest in stolen suitcase). As the court stated in *Moore* (562 F.2d at 111), "the possessors of such [contraband] articles have no legitimate expectation of privacy in substances which they have no right to possess at all. • • • The narcotics peddler • • • has no privacy interest in the substance • • • ."

We recognize that *United States* v. *Jeffers*, 342 U.S. 48 (1951), can be read to allow a suppression claim to be based on the defendant's interest in seized contraband. However, as discussed below (see pages 25-26, *infra*), *Jeffers* is properly understood in terms of the defendant's legitimate expectation of privacy in the hotel room that was searched, an expectation that was not lost simply because he used the room in part as a storage area for his narcotics. Moreover, insofar as *Jeffers* held that the defendant's possessory interest in the seized contraband was sufficient to confer "standing" to challenge the search, it is inconsistent with subsequent decisions of this Court and therefore is no longer authoritative.

In sum, the Ninth Circuit plainly erred in concluding that respondent had an expectation of privacy in the *Sea Otter* because of his role as a co-venturer with a possessory interest in the seized marijuana.[18]

[18] The court below also noted (Pet. App. 3a) that "to find the marijuana it was necessary to pump out the forward hold of the boat, indicating that reasonable precautions had been taken to preserve privacy." This is plainly a makeweight. "The concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the authorities" (*Jacobsen*, slip op. 12 (footnote omitted)); thus, the fact that a criminal intends contraband to remain hidden does not establish a Fourth Amendment privacy interest. See *Rakas*, 439 U.S. at 143-144 n.12; *United States* v. *Sardo-Vella*, 760 F.2d 1232, 1236-1237 (11th Cir. 1985). Beyond that, there is no indication that respondent had anything to do with the decision to put either the marijuana or the water in the hold. Cf. *United States* v. *Little*, 735 F.2d at 1052-1053; *United States* v. *Fahnbulleh*, 748 F.2d 473, 477 (8th Cir. 1984). Moreover, the most likely explanation is that the water provided ballast for the boat after its multi-ton cargo of marijuana had been unloaded, not that it was used to conceal the marijuana that was being transported. And at all events marijuana debris was also discovered in plain view on the *Sea Otter*. Finally, as other courts of appeals have recognized, there is no substantial expectation of privacy in the hold of a boat, which is an area open to common access and subject to routine inspections by law enforcement officials. See, *e.g.*, *United States* v. *Lopez*, 761 F.2d 632, 635-636 (11th Cir. 1985); *United States* v. *Manbeck*, 744 F.2d at 384 n.37; *United States* v. *Herrera*, 711 F.2d 1546, 1553 n.12 (11th Cir. 1983); *United States* v. *Bent*, 707 F.2d 1190, 1193 (11th Cir. 1983), cert. denied, No. 83-5835 (Apr. 30, 1984); *United States* v. *Freeman*, 660 F.2d 1030, 1034 (5th Cir. 1981), cert. denied, 459 U.S. 823 (1982); *United States* v. *Willis*, 639 F.2d 1335, 1337 (5th Cir. 1981); *United States* v. *Williams*, 617 F.2d 1063, 1075, 1085-1086 (5th Cir. 1980) (en banc). See generally *United States* v. *Villamonte-Marquez*, 462 U.S. 579 (1983); *United States* v. *Ross*, 456 U.S. 798, 805-806 & nn.6, 7 (1982); *Carroll* v. *United States*, 267 U.S. 132, 149-153 (1925); 14 U.S.C. 89(a); 16 U.S.C. 971f; 19 U.S.C. 1581(a).

3. The Conjunction Of Respondent's Asserted Interests

The decision below cannot be justified by the court of appeals' unexplained reliance on the foregoing factors in "conjunction" rather than individually (Pet. App. 2a). As demonstrated above, neither respondent's title to the *Sea Otter* nor his role as a co-venturer with a possessory interest in the seized marijuana gave rise to an expectation of privacy in the searched vessel. We fail to see how these considerations, which separately afford no analytical basis for a claim of privacy, can be taken in the aggregate to establish a cognizable privacy interest. The Ninth Circuit cannot evade this Court's precedents by purporting to rely on a cumulation of legally insufficient factors.

That is not to say, of course, that an expectation of privacy cannot arise from a combination of circumstances even though each individually would fall short of establishing a privacy interest. But the individual factors must bear on and contribute to the defendant's claim of privacy before their combined effect becomes material. By contrast, for respondent and other defendants in like situations, neither their title to the searched conveyance nor their role in a joint drug smuggling enterprise advances the asserted privacy interest in any way, and these factors take on no greater force when considered together rather than separately.

Finally, *United States* v. *Jeffers*, 342 U.S. 48 (1951), upon which the Ninth Circuit relied (Pet. App. 2a), does not support the decision below. The defendant's "standing" in *Jeffers* was based on two factors: (1) his interest in the searched hotel room rented by his aunts, including the facts that the aunts had given him a key and allowed him to use the room at will and that he had in fact often entered the room for various purposes, and (2) his claimed ownership of the seized narcotics that he had hidden in the room. As the Court explained in *Rakas* (439 U.S. at 136) and *Salvucci* (448 U.S. at 90-91 n.5), *Jeffers*

rested on the confluence of these factors to establish that, in light of the defendant's access to and use of the room, he had a reasonable expectation of privacy in the premises. See also *Jones*, 362 U.S. at 259, 265. However, *Jeffers* does not suggest that an ownership or other proprietary interest in the searched area necessarily demonstrates a privacy interest or that "legal ownership of the seized good [is] sufficient to confer Fourth Amendment 'standing.'" *Salvucci*, 448 U.S. at 90-91 n.5; see also *id.* at 116, 118 (Marshall, J., dissenting).

While we do not disagree, for the reasons discussed above, that "[o]wnership of both the place searched and the item seized" (Pet. App. 2a) may often be relevant to a defendant's expectation of privacy, that general observation provides no basis for the legal rule formulated by the court of appeals that a defendant who owns a conveyance used in a collective scheme to transport contraband drugs in which he has an interest is entitled, without more, to challenge the validity of a search of the conveyance. Bare title and concerted criminal activity do not give rise to a reasonable expectation of privacy on the part of an absentee owner who had never personally used the conveyance and had relinquished custody and control of it for an extended period.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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